

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1085

In the
United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1085

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

LAWRENCE J. MITCHELL, YVONNE A. SCHENNAULT,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of New York.

BRIEF FOR DEFENDANT-APPELLANT
YVONNE A. SCHENNAULT

ROYAL B. MARTIN, JR.
7 South Dearborn
Chicago, Illinois 60603
Tel: (312) 236-2994

Attorney for Defendant-Appellant
YVONNE A. SCHENNAULT

Of Counsel:
IRA M. BURMAN
HARRIS, BURMAN AND SILETS

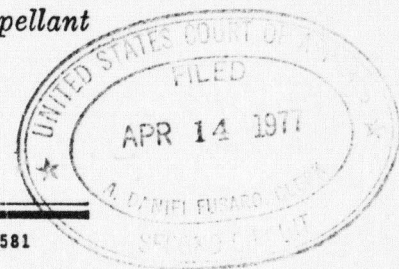


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STATUTORY PROVISIONS INVOLVED

Title 21 U.S.C. § 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Title 21 U.S.C. § 841. Prohibited acts A--Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

* * * *

Penalties

(b) Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1) (A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than \$25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than \$50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

* * * *

FRIEND'S LAW MARK
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, :
 :
Plaintiff-Appellee, :
 :
v. : No. 77-1085
 :
LAWRENCE J. MITCHELL, YVONNE A. :
SCHENNAULT, et al., :
 :
Defendants-Appellants. :

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT YVONNE A. SCHENNAULT

Statement of the Case

YVONNE A. SCHENNAULT, a defendant in this case, appeals from the judgment of conviction entered in the United States District Court for the Southern District of New York on January 21, 1977, after a trial before the Honorable Richard Owen and a jury.

Indictment No. 76 CR 324 charged thirty-three defendants with conspiracy (Count I) and substantive counts from January 1, 1968 up to the date of the filing of the

indictment, April 5, 1976, in violation of both the old and the new narcotics laws.

Appellant Schennault individually was charged in the conspiracy count, Title 21, United States Code, §846, and two substantive counts, Title 21, United States Code, §841(a)(1), (Counts Thirteen and Fifteen).

Schennault was jointly tried with twenty-one other defendants in a trial which consumed approximately fourteen weeks, with the jury returning verdicts of guilty against a total of seventeen defendants. Schennault was convicted under the conspiracy count and one substantive count (Count Thirteen). The jury acquitted Schennault of the remaining count (Count Thirteen).

Schennault received consecutive sentences totalling twenty years. Immediately upon conviction, the trial judge revoked Schennault's bond and remanded her to the custody of the United States Marshal. Appellant Schennault is presently incarcerated.

STATEMENT OF FACTS

The evidence relating to Yvonne Schennault consisted of the testimony of two witnesses, JOHN BROWN and MICHAEL PARKER.^{1/} The jury chose, however, not to believe Parker insofar as Yvonne Schennault was concerned, for Parker was the sole witness who testified concerning Count Fifteen of the indictment, a substantive charge of which Schennault was found not guilty.

John Brown, an unindicted co-conspirator, testified that he first met Yvonne Schennault around Christmas of 1971 (1173).^{2/} At that time, Brown received a phone call from AL WILLIAMS from Chicago, who told Brown that he was coming to New York and that he had someone with him whom he wanted Brown to meet.^{3/} Having arrived in New York, Williams introduced the Appellant Schennault and DONALD O'DOOD to

^{1/} As an aid to the Court, the instant Statement of Facts is confined to the evidence relating solely to the Appellant Schennault. For a comprehensive recitation of the evidence below in its entirety, see the Statement of Facts submitted in the brief on behalf of the Appellant Frank Moten, which Schennault adopts by reference herein.

^{2/} All references in parentheses, unless otherwise indicated, refer to the transcript of trial comprising the joint appendix of appellants.

^{3/} Al Williams, a/k/a Big Al from Chicago, was never apprehended subsequent to the return of the instant indictment.

FRIEND'S LAW MARK
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Brown.^{4/} According to Brown, Schennault stated that she wanted three kilos of heroin and inquired as to whether Brown could get it for her. Brown stated " he thought he could (1174). While Williams and Schennault left to obtain a rental car, Brown rendezvoused with his heroin connection, STEVEN DELLACAVA, and made arrangements to purchase three kilograms of heroin from Dellacava.^{5/} Brown apparently had an arrangement with Dellacava, in which Dellacava would deliver the heroin to a car, the description of which Brown had previously furnished Dellacava. Dellacava would remove the key from under the mat on the driver's side of the car, open the trunk and place the heroin in the trunk of the car, removing the money from the trunk, which would have been left in payment for the heroin. After substituting the heroin for the money, Dellacava would replace the key under the mat in the automobile. Having made arrangements with Dellacava, Brown returned to his apartment where Schennault, Brown and O'Dood were waiting. Brown testified that he was charging \$27,000.00 for a kilo of heroin, and that the money was placed in the

^{4/} O'Dood was acquitted of all charges by the jury.

^{5/} Dellacava was indicted with the appellant, but his case was severed prior to trial.

trunk of the rented car, according to the arrangement he had with Dellacava (1177). Brown, Schennault, O'Dood and Williams waited in the apartment, periodically checking the trunk of the car to determine whether the transfer had been made. After spending all night in the apartment, sometime early the following morning they checked the car, and found that the key was not under the mat (1178). The car was located in a no-parking zone and would have been towed away at 7:00 a.m. Brown testified that Schennault then went to the Hertz Rental Car Agency, returning with an employee of the Agency who opened the car and provided Schennault with a key.^{6/} Brown and Schennault thereafter opened the trunk and found several half-kilo packages. The money was gone (1178). Brown testified that Schennault merely picked up the packages, and that she did not open, examine or test the contents of the packages (1178-79).

Brown testified that the next contact he had with Schennault occurred in the summer of 1973. Brown had received from TONY ALVAREZ and ANGELO RODRIGUEZ approximately seventeen or eighteen kilograms of cocaine (1370). Brown stated that he thereafter called Schennault in Chicago and stated that he wanted to see her. Brown stated that Schennault thereafter came to New York and visited Brown at an apartment in which

^{6/} No Hertz employee was called as a witness to corroborate Brown's testimony.

he was living in Brooklyn (1371). On this occasion, Brown testified that he gave Schennault at least ten or twelve kilograms. The following is the entire transcript of this transaction, as related by Brown:

Q: Sometime after you received this shipment, did you have occasion to call or speak to the defendant Yvonne Schennault?

A: Yes, I did.

Q: Tell us about that conversation.

A: I called Yvonne in Chicago and told her I would like to see her. I told her that if I could see her, and I gave her the phone number and I told her to call me when she got in town. When she got in town, she called me, and I told her to come to 28--to my address in Brooklyn. She did. During this time she stayed with me quite a while, we talked, and everything, and the shipment that I had received from Angelo and Tony, I gave her the bulk of it.

Q: Do you recall approximately how much
you gave her?

A: I gave her at least ten or twelve kilos.

According to Brown, there were no other individuals present during this transaction, and no conversation ensued between Brown and Schennault indicating the source of Brown's narcotics or the existence of other so-called wholesalers with whom Brown allegedly did business.

By 1974, Brown was living in Miami. Brown testified that late in February of 1974, he had received a shipment from Tony Alvarez of sixteen or seventeen kilos of cocaine (1378). Brown thereafter called Schennault in Chicago and told her that it was urgent that he see her, that he was in Miami, and that he wanted her to come down (1379). Again, the following is the entire transaction as related by Brown:

Q: Did you see the defendant Yvonne
Schennault in Miami on that occasion?

A: Yes, I did.

Q: What happened?

A: I sold her from the stuff that I had
got from Angelo on that first trip
most of the cocaine that I had. It
was either 12 or 14 kilos.

Q: Where did you give her the cocaine?

A: Gwen went to pick her up at the Holiday Inn and she brought her over to my apartment on 183rd Street. Gwen left and went out and Yvonne and I talked and this is when the exchange went down.

Q: Did you get any money from her on this occasion?

A: Yes, I did.

Q: What kind of currency did she give you?

A: Oh, she always gave me large bills, in fifties and hundreds, and they were brand new (1380-81).

Consistent with the prior alleged transactions, there was no testimony concerning sources of supply or the identity or existence of other alleged customers of Brown.

Brown further testified that Schennault visited him in Miami in April of 1974, bringing him some money in payment for narcotics which she had purchased in February of 1974 (1396-97). According to Brown, Schennault also visited him in Miami in May of 1974, at which time he gave her from twelve to fourteen kilos of cocaine (1398); in

July of 1974, when she brought him some money (1405); and September or October of 1974, when Brown transferred fifteen or perhaps seventeen kilos of cocaine to Schennault (1411). On this latter occasion, Brown testified that Schennault gave him around \$60,000.00 or \$70,000.00 (1411).

Just prior to Thanksgiving of 1974, Brown travelled from Miami to Washington, D. C., at which time, pursuant to a telephone call from Brown, Schennault travelled to Washington, D. C., bringing Brown some clothing, two fur coats and approximately one-half kilo of cocaine (1417-18).

Other than the transaction of December, 1971, in which Al Williams and Donald O'Dood allegedly participated, and two innocuous instances of surveillance during which an Internal Revenue Service agent observed O'Dood or his car at the residence of Schennault (5912-16), there was no evidence introduced at trial showing any contacts with or relationship between appellant Schennault and any of the other thirty-two defendants with whom she was indicted.

ARGUMENT

POINT I

THOUGH THE INDICTMENT CHARGED
ONE CONSPIRACY, THE PROOF
ESTABLISHED SEVERAL SEPARATE
CONSPIRACIES, WHICH VARIANCE
AFFECTED THE SUBSTANTIAL
RIGHTS OF THE APPELLANT

A conspiracy is an agreement between two or more persons to achieve an unlawful object or to achieve a lawful object by unlawful means. Krulewicz v. United States, 336 U.S. 440, 447 n. 4 (1949) (Jackson, J., concurring). The essence of the crime is therefore the agreement, and if the evidence below did not establish the existence of a singular agreement among all of the defendants and co-conspirators, the convictions must be reversed. See United States v. Borelli, 336 F.2d 376 (2d Cir. 1964), cert denied, sub. n. 1. Cinquegrano v. United States, 379 U.S. 960 (1965). The evidence at trial did indeed establish the existence of an agreement between the appellant Intersimone and Jack Brown, an agreement between Brown and various Washington, D. C. traffickers, an agreement between Brown and several New York-New Jersey traffickers, and finally an agreement between Brown and a

number of New York City distributors. The transactions involved in the aforementioned agreements had nothing to do with the activities of Schennault. Schennault neither purchased from nor sold to and, indeed, had no knowledge of any of the defendant-participants to those agreements. Proof of such agreements established the existence of multiple conspiracies, as defined in Kotteakos v. United States, 328 U.S. 753 (1945). Furthermore, the introduction of evidence establishing such independent and unrelated conspiracies constituted a variance between the indictment and proof, which affected "the substantial rights" of the appellant. Berger v. United States, 295 U.S. 78, 82 (1935).

The government's evidence, taken in its most favorable light, established the existence of a conspiracy between Brown and the appellant Intersimone. Brown testified that he met Intersimone in 1959 through a friend of Brown's named Jimmy Richardson, who owned a grocery store in the neighbor of 123rd and 124th (1000). Brown was dealing in heroin at this time and had a partner named Mojo, whose true name was Glennard Spearman (1001). Through the intervention of Richardson, Brown and Mojo purchased a kilogram of heroin from Intersimone in 1959 (1006). During 1959 and 1960, Brown testified that he further met with Intersimone on

several occasions, purchasing heroin from him (1025). The last time that Intersimone sold narcotics to Brown was sometime in the fall of 1971, when Brown purchased approximately four kilograms of heroin (1146). Brown's customers for the four kilogram transaction were the appellant's Foster, Sampson, Hightower, Davis and Marion Dunmore (1147-49).^{7/} At no time was there evidence introduced establishing a relationship between Intersimone and Schennault, and as shall be seen, infra, at no time was there any contact between, or relationship among, Schennault on the one hand, and Foster, Sampson, Hightower, Davis and Dunmore on the other.

Brown testified that he began selling narcotics to the appellants Hightower and Foster in approximately 1966 and 1967, and up until 1972 Brown sold Hightower and Foster both heroin and cocaine (1152-61). Subsequent to 1972, Brown continued to do business with Hightower through Brown's son-in-law, Michael Parker, and Lois Sampson (1161). The testimony established that Hightower, Foster, Lois Sampson and her husband, Joseph Sampson, were middle-level traffickers from Washington, D. C., traffickers whom Yvonne Schennault neither met, nor was aware of, nor with whom in any manner she transacted business.

^{7/} Dunmore was acquitted by the jury.

There were further numerous narcotics transactions between Brown and the New York-New Jersey defendants, Reynolds, Cowpers, Davis and Morgan; between Brown and independent New York traffickers, including Albert Jones, Don Wilson, James Laws and Raphael Bonilla; finally, Brown dealt with middle-level traffickers who, according to the government's theory of the case, were grouped under the defendant Frank Moten-- Bernard Brightman, John Morris, Solon Glaze, L. J. Mitchell and Willie Womack. Nevertheless, the proof failed to establish a scintilla of evidence from which even the inference of a connection could be established between Yvonne Schennault and any one of the previously mentioned middle-level traffickers. Since the essence of the crime of conspiracy is the agreement, this Court must consider the above evidence in determining "what kind of agreement ... existed as to each defendant," Borelli supra, at 384, and determine whether there was any connection whatsoever between Schennault and the alleged other middle-level traffickers.

In United States v. Miley, 513 F.2d 1191 (2d Cir. 1975), cert denied, 423 U.S. 842, the evidence at trial showed that Brandt and Miley entered into a conspiracy with Goldstein, Bachia and Godinsky, as well as a separate con-

spiracy with Lang, Wenzler, Flores and Vavarigos. The difficulty with the case was that the government had included all of the participants from both conspiracies in a single indictment, when "there was no evidence specifically linking" Goldstein, Bachia and Godinsky with Lang, Wenzler, Flores and Vavarigos. Miley, supra at 1206. The court in Miley found that there were in fact multiple conspiracies proven when only one was charged, holding that Brandt's activities as the common denominator of both conspiracies were not of such a nature that the participants in the Goldstein conspiracy must necessarily have known of the existence of the participants in the Lang conspiracy. Similarly, the activities of Brown vis-a-vis the middle-level traffickers other than Schennault, were not of such a nature that Schennault must have been aware of their existence. Shennault's first transaction, according to Brown, occurred in December of 1971, at which time Schennault purchased three kilograms of heroin, the entire amount supplied to Brown by Dellacava. There was no testimony that conversations occurred in which Brown indicated the existence of other customers, nor does it appear from the record that Brown was in possession, insofar as Schennault was aware, of narcotics other than that which he transferred to Schennault

at that time. Brown testified that the next occasion he engaged in a narcotics transaction with Schennault was during the summer of 1973, almost two years after their previous contact. At this 1973 transaction Brown stated that he transferred twelve to fourteen kilograms of cocaine to Schennault. Again, there is no evidence in the record to support any inference that Schennault was aware of the existence of any other middle-level traffickers with whom Brown may have been dealing. The three transactions with Schennault, as related by Brown at trial, which occurred in 1974 in Miami were consistent with their two prior transactions in that they occurred in the presence of no one else and no conversations took place which indicated Brown was engaged in transactions with other individuals. It is more likely, given the size of the transactions, that Schennault reasonably believed that she was Brown's sole customer, particularly in light of Brown's telephone calls to Schennault immediately after deliveries of cocaine from Alvarez and Rodriguez, in which he would tell Schennault that he had received the shipment and that he wanted to see her immediately (1371, 1379, 1397).

Inasmuch as the indictment charged one conspiracy, whereas the proof at trial established the existence of multiple conspiracies, there has been a material variance. As this Circuit has noted many times, however, a material

variance is not sufficient to mandate a reversal unless there has been such a variance as to affect the substantial rights of the appellant. United States v. Toliver, 541 F.2d 958, 962 (2d Cir. 1976); United States v. Bertolotti, 529 F.2d 149, 155 (2d Cir. 1975).

In United States v. Berger, 73 F.2d 278, 280 (2d Cir. 1934), reversed on other grounds, 295 U.S. 78, this Court discussed what would affect substantial rights sufficiently to constitute a material variance and require reversal. Specifically, the court stated that the variance would be material where surprise hampers the presentation of the defense or where, as in the present case, "it will allow the production of evidence not competent or material to the crime he has committed."

As shall be seen in Point II, infra, the extraordinary amount of similar crime evidence occurring without the chronological parameters of the charged conspiracy introduced against other defendants, the endless weeks of trial Schennault was required to sit through during which no evidence was introduced against her and the improper redirect examination of government witness Jack Brown concerning his knowledge of numerous narcotics traffickers unrelated to the instant case who had been murdered could not but harm Schennault in a material way. Thus, because

the evidence established multiple conspiracies, the government failed to prove the single conspiracy alleged in the indictment. The judgment should therefore be reversed.

POINT II

THE "SPILL-OVER" EFFECT FROM
THE JOINT TRIAL OF TWENTY-TWO
DEFENDANTS IRREPARABLY PREJUDICED
THE ABILITY OF THE JURY TO GIVE
SEPARATE AND INDIVIDUAL CONSIDERATION
TO APPELLANT

The trial below commenced on August 10, 1976. The first testimonial evidence offered against Schennault was from Jack Brown, who mentioned Schennault in his testimony on four consecutive trial days, August 20, August 23, August 24, and August 25. A period of two and one-half weeks elapsed before another government witness mentioned Schennault. On September 13, 1976, Michael Parker testified about certain transactions which formed the basis for Count Fifteen of the indictment. However, the jury discounted Parker's uncorroborated testimony concerning Schennault and found her not guilty on that count. Three and one-half weeks later, on September 13, 1976, a final piece of testimonial evidence relating to Schennault was heard. Internal Revenue Service Special Agent Phillip Di Pasquale testified that on two occasions in 1972 he was conducting surveillance of Donald O'Dood. Di Pasquale stated that on the first occasion he observed O'Dood enter the residence of Schennault (5912). On the second occasion

Di Pasquale noticed an automobile registered to O'Dood parked at the rear of the Schennault residence (5915). On neither occasion did Di Pasquale observe the presence of Schennault. Because the jury acquitted O'Dood of both counts for which he was indicted, Di Pasquale's testimony can be discounted as irrelevant. For the one and one-half weeks following Di Pasquale's testimony, no testimonial evidence was introduced against Schennault. The substance of the aforementioned factual recitation resulted in Schennault being "forced to sit through [approximately seven and one-half] weeks of damaging evidence relating to" co-defendants. United States v. Miley, supra, at 1209.

In Miley the court, having found a variance between the offense charged in the indictment and the proof at trial, examined the record to determine whether the defendants therein suffered prejudice affecting their substantial rights by virtue of the variance. The court concluded that there was no prejudice:

However, this was not a case where a minor participant in one conspiracy was forced to sit through weeks of damaging evidence relating to another. The whole trial consumed but five days and the crimes of the various appellants were not markedly different. Nor do we have a case in which, for instance, thirty-six persons in eight separate conspiracies were prosecuted in a trial

in which one defendant could be swept along with the others, where '[t]he dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial right has not taken place." 513 F.2d at 1209 (citations omitted).

In Kotteakos v. United States, supra, thirty-two defendants were indicted, nineteen went to trial, thirteen of whom were submitted to the jury. The Supreme Court was distressed by the large number of defendants and conspiracies established by the proof, and found intolerable the burden placed upon a defendant to "safeguard against evidence affecting other defendants, to prevent its transference as 'harmless error' or by psychological effect, in spite of instructions for keeping separate transactions separate." 328 U.S. at 767.

In United States v. Toliver, supra, six defendants went to trial out of nine originally indicted. On appeal the appellants contended that the proof educed two separate conspiracies when only one had been charged. This Court did not reach the multiple conspiracy issue, finding that the "number of conspiracies and conspirators ... was not sufficient to indicate a spill-over effect." 541 F.2d at 963. In determining whether or not in the first instance any "spill-over" occurred affecting the substantial rights of the defendants, this Court held that such consideration:

turns in part on whether the numbers of conspiracies and conspirators involved were too great for the jury to give each defendant the separate and individual consideration of the evidence against him to which he was entitled. Id at 963.^{8/}

The sheer number of defendants charged in the instant conspiracy brings to mind the cautionary instructions of this Court in United States v. Sperling, 506 F.2d 1323, 1340 (2d Cir. 1974):

[W]e take this occasion to caution the government with respect to future prosecutions that it may be unnecessarily exposing itself to reversal by continuing the indictment format reflected in this case. While it is obviously impractical and inefficient for the government to try conspiracy cases one defendant at a time, it has become all too common for the government to bring indictments against a dozen or more defendants and endeavor to force as many of them as possible to trial in the same proceeding on the claim of a single conspiracy when the criminal acts could be more reasonably regarded as two or more conspiracies, perhaps with a link at the top.

Specific instances of the "spill-over" effect permeate the record. In particular, extensive testimony was received into evidence relating to prior similar acts of co-defendants, not admissible against Schennault. It is conceded that under different circumstances, prior similar

^{8/} As to one defendant below, Bernard Brightman, the jury was unable to reach a verdict. Upon retrial individually, the jury found Brightman not guilty. The "spill-over" effect as to Brightman in his original trial could not be more apparent.

act evidence may be received, assuming the purpose for its introduction is not to prove criminal character on the part of the defendant against whom it is offered. See United States v. Gerry, 515 F.2d 130 (2nd Cir. 1975). In the context of the instant mass conspiracy, however, it is submitted that the quantity of such evidence introduced at trial abrogated the ability of the jury to consider the case against Schennault independently of that of her co-defendants. There was testimony that prior to the inception of the conspiracy, Intersimone sold a total of three kilograms to Brown on two separate occasions in 1959 (1006, 1025); that in 1964 or 1965 Brown purchased one kilo of heroin from Intersimone (1033); that during 1965 and 1966 Brown purchased heroin from Patty Pontiac and Jenks, neither of whom were defendants during the instant trial (1043); from 1964 until 1966 Brown purchased narcotics from another non-defendant, Joe Paradise (1044); from 1966 until 1967 Brown purchased drugs from Flo Isabella, not indicted in this case (1045); in 1967 Brown purchased a kilo of cocaine from Angelo Rodriguez (1052-1054); in November, 1966 Brown sold heroin and cocaine to Hightower (1153-1156); in 1967 Brown sold narcotics to non-defendant, Roland Brown, and Joseph Sampson (1165) and Solon Glaze (1183); and in 1966 Brown testified that he began selling narcotics to Charles Cowper (1208).

The foregoing purchases and sales of narcotics by Jack Brown are only a partial statement of those individuals with whom Brown dealt, who were either not defendants or co-conspirators in this case or who dealt with Brown during a time period other than that encompassed by the conspiracy count. Assuming the admissibility of such evidence against the individual defendants with whom Brown dealt, no theory could possibly justify the admissibility of such transactions against the appellant Schennault. Indeed, even admitting the evidence with a limiting instruction to the jury could not mitigate its impact. As this Court pointed out in United States v. DeCicco, 435 F.2d 478, 483 (2d Cir. 1970);

Little discussion is needed to demonstrate that prior similar acts of misconduct performed by one person cannot be used to infer guilty intent of another person who is not shown to be in any way involved in the prior misconduct, unless it be under a 'birds of a feather' theory of justice. Guilt, however, cannot be inferred merely by association. In any event, we conclude that the prejudice engendered by the admission into evidence of the prior acts of misconduct, even against Russell DiCicco and Gregory Parness, the doers thereof, far outweighed its legitimate probative worth, and that therefore it was an abuse of discretion for the trial court to allow its admission, though the admission of the testimony was accompanied by cautionary instructions to the jury.

The difficulties encountered by a juror in giving "each defendant, the separate and individual consideration of the evidence against him to which he (is) entitled," United States v. Toliver, supra, at 963, has crystallized in this case. In a letter dated November 27, 1976 to Chief Judge Kaufman, the forelady of the jury during the trial below expressed the extraordinary difficulty facing a juror required to compartmentalize evidence when twenty-two individuals are tried simultaneously. As this juror concluded, "It was virtually impossible to arrive at a fair and just verdict for those twenty-two people," in light of the quantity of evidence presented to her. Given the enormity of the factual data with which the jury had to deal:

[T]he dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial right has not taken place. Kotteakos v. United States, supra, at 774.

POINT III

THE REDIRECT EXAMINATION OF
THE WITNESS BROWN CONCERNING
MURDERS OF NARCOTICS TRAFFICKERS
UNRELATED TO APPELLANT WAS HIGHLY
INFLAMMATORY AND DEPRIVED APPELLANT
OF A FAIR TRIAL

The redirect examination of the government's key witness, John Brown, "dramatically" concluded with a series of questions apparently calculated to convince the jury that Brown surrendered to the FBI because he feared for his life. The record reveals, however, that the examination by the government consisted only of "shocking and inflammatory" matters which necessarily had the impact of unfairly connecting the appellant with murders having occurred prior to the inception of the charged conspiracy, and unrelated to that conspiracy, rather than Brown's fear for his life.

Brown testified that Joe Paradise was involved in narcotics and that at the time of Brown's testimony, Paradise was dead (2945-46). Timely objection was interposed by counsel, as were motions for a mistrial and a severance (2947). The court overruled the objection and denied the motions, and the prosecution then commenced the following examination:

Q: Mr. Brown, did you know an individual named Pretty Willie?

A: Yes, I did.

Q: Do you know his true name?

A: Yes, I do.

Q: What was it?

A: Willie Williams.

Q: Was he involved in a narcotics trade?

* * *

A: Yes.

Q: Is he alive or is he dead?

A: He's dead.

Q: When did he die?

A: 1967.

Q: How did he die?

A: He was murdered (2949).

Brown then further related that he knew four other individuals who had been involved in narcotics trafficking, two of whom had never been mentioned before in the trial testimony, and all four of whom were murdered (2950-51). At no time did the government seek to establish that any of the murdered

narcotics peddlers met their demise as a result of their trafficking or for any other reason which may have been probed by defense counsel on cross-examination of Brown. None of the murders were even remotely connected to Schennault.

No defendant ought to have a jury which is considering his guilt or innocence hear evidence of this sort absent proof connecting him with the subject matter discussed. Bertolotti, supra, at 158.

Compounding the prejudice was the government's reiteration of the murders of the narcotics peddlers during summations to the jury. During his rebuttal argument, the Assistant United States Attorney, in commenting on Brown's motivation to become a government witness, stated that Brown "surrendered himself because there was a contract on his life," and likened Brown's situation to that of the seven narcotics peddlers, all of whom were murdered. Such inflammatory testimony and argument to the jury incalculably prejudiced Schennault's right to a trial free from passion and prejudice, and mandates of a reversal of the conviction.

POINT IV

THE IMPOSITION OF A
TWENTY YEAR SENTENCE
CONSTITUTED AN ABUSE OF DISCRETION

At the time of the imposition of sentence, Schennault was 47 years old, the owner of a restaurant in Chicago and the mother of a multiple sclerotic daughter (2206-07). There was no evidence introduced at trial that prior to late 1971, Schennault had been involved in the narcotics business to any extent whatsoever. Additionally, among the seventeen defendants convicted, only one, the appellant Moten, received a sentence in excess of twenty years. Appellant submits that a sentence of twenty years is "tantamount to a life sentence," United States v. Robin, 545 F.2d 775, 782 (2d Cir. 1976), and constituted an abuse of discretion. The conviction should therefore be reversed and remanded for resentencing.

POINT V

PURSUANT TO RULE 28(1),
FEDERAL RULES OF APPELLATE
PROCEDURE, APPELLANT SCHENNAULT
ADOPTS BY REFERENCE THE POINTS
AND ARGUMENTS OF ALL
CO-APPELLANTS APPLICABLE TO HER

CONCLUSION

THE JUDGMENT BELOW SHOULD BE REVERSED.

Respectfully submitted,

ROYAL B. MARTIN, JR.
Attorney for Defendant-Appellant
Yvonne A. Schennault

Royal B Martin Jr

Of Counsel:

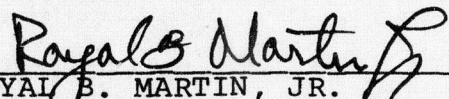
IRA M. BURMAN
Harris, Burman and Silets
7 South Dearborn Street
Chicago, Illinois 60603
312/236-2994

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, :
Plaintiff-Appellee, :
v. : No. 77-1085
LAWRENCE J. MITCHELL, YVONNE A. :
SCHENNAULT, et al., :
Defendants-Appellants. :

PROOF OF SERVICE

I, ROYAL B. MARTIN, JR., having been first duly sworn on oath, depose and say that I mailed on April 13, 1977, two copies of appellant YVONNE SCHENNAULT'S Brief to the United States Attorney, One St. Andrew's Plaza, New York, New York, Attention Mr. Dan Beller.



ROYAL B. MARTIN, JR.

SUBSCRIBED AND SWORN TO
before me this 13th day
of April, 1977.



Notary Public

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